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Supreme Court of the United States

October Term 1968

No. 1,276

WILLIAM H. ROBERTS,
Petitioner,

v.

WILLIAM J. McDONALD
and
THE CATHOLIC UNIVERSITY OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its Order of June 16, 1969, denying the Petition for Writ of Certiorari————————U.S.————————(1969) and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the Petition filed April 17, 1969, herein.

Petitioner requests rehearing of the aforesaid Order of this Court

(1) On the ground that Petitioner presents the following question which was not presented in the original Petition for a Writ of Certiorari, namely:

Whether the Court of Appeals in affirming the denial of Petitioner's Motion by the District Court on grounds different from those on which the District Court had relied but which were not based either on findings of fact by the District Court, or on facts found by the Court of Appeals in *de novo* review, and/or without adequate references to specific facts in the record before the Court of Appeals, departed from the accepted and usual course of judicial proceedings to such a degree as to call for an exercise of this Court's power of supervision pursuant to Rule 19 of its Rules;

(2) On the ground of new and conflicting decisions by other courts of appeals.

REASONS FOR GRANTING PETITION FOR REHEARING

I

Presentation of New Question

1. ARGUMENT:

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS IN AFFIRMING THE ORDERS OF THE DISTRICT COURT DENYING PETITIONER'S MOTIONS FOR A PRELIMINARY INJUNCTION RELIED ON GROUNDS WHICH CONSISTED OF "A SERIES OF ESTIMATES" OF AN "INTANGIBLE NATURE" *Perry v. Perry,* 190 F.2d 601, 602 (D. C. Cir. 1951) WHICH HAVE NO FOUNDATION IN THE FINDINGS OF FACT BY THE DISTRICT COURT, OR BY THE COURT OF APPEALS IN *DE NOVO* REVIEW, AND/OR IN THE RECORD BEFORE THE COURT OF APPEALS.

2. Since this Court's jurisdiction over the instant case has been established by a timely Petition for Writ of Certiorari "questions not presented in the original petition are not foreclosed upon rehearing" Stern and Gressman, Supreme Court Practice (3rd Ed. 1962), 390. See also Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction, 46 Columbia Law Review, 255, 263 (1946).

3. (a) In his Amended Motion for Preliminary Injunction, filed on November 2, 1967 (R. 190-191) (hereinafter "first motion") Petitioner relied (i) on the well-established doctrine that equity courts will grant relief to prevent a party to a contract from either incapacitating itself from performing the contract, or from interfering with the other party's performance of the contract; (ii) on the well established doctrine that equity courts will protect public interests, specifically, in the instant case the public interest in protecting the Institute's students from being deprived of rights and privileges as third-party beneficiaries and/or as parties to their respective matriculating contracts with the University.

(b) On January 23, 1968, Petitioner filed a second Amended Motion (R. 206-207) (hereinafter "second motion") in which he relied on *additional* and *different* facts and evidence which had not previously been available (R. 428-439); and *in addition* to the aforementioned grounds on which the first motion had been based, on the well-established doctrine that equity courts will exercise their power to prevent (i) frustration of litigation (R. 434-439); and (ii) impending injury resulting from malicious, arbitrary, reckless and oppressive acts done in bad faith (R. 209-212; 436-444).

4. In the hearing on the first motion, Judge Sirica stated on November 9, 1967, the District Court's *own* considerations leading to denial of Petitioner's motion. Judge Sirica said:

> "There are some very interesting questions. I think what you have here if you can prove what you say is an action for breach of contract – breach of fiduciary duty. That case is not before this Court. The only thing that is before me now is a motion for preliminary injunction. . . . *I don't think I should at this point intervene in the internal affairs of the university. I think that is what I would be doing if I ordered the preliminary injunction.* . . ." (R. 623) (emphasis added).

On the other hand, the "findings of fact and conclusions of law" filed on November 21, 1967 (Pet. pp. 7a-11a) are not the District Court's *own* considerations but they are merely a verbatim and mechanical adoption of the findings of fact and conclusions of law drafted by the Respondents (R. 663-669). In this connection, it has been aptly said that:

> "We have recently asked for 'brief and pertinent findings of contested matters. . . rather than the argumentative. . . documents prepared by winning counsel.' Otherwise we lose the benefit of the Judge's own considerations." *U.S. v. Forness*, 125 F.2d 928, 930 (2 Cir. 1942).

5. In the hearing on the second motion, Judge Hart stated on February 2, 1968, that

> "I find nothing in the second amended motion that would change the situation as it existed when Judge Sirica ruled. . . . " (Pet. p. 13a).

Clearly, the District Court disregarded here the fact that the second motion had not only been based on additional and new facts and evidence, but also on grounds which were different from those on which Petitioner had relied in his first motion (p. 3, *supra*). Consequently, the District Court failed in gross violation

of the mandatory provision of Rule 52(a), *Fed. R. Civ. P.* to file any findings of fact and conclusions of law (Pet. Reply Br. pp. 4-5).

Since the District Court failed to file such aforesaid findings and conclusions, it can only be inferred that the District Court accepted – however grossly erroneous as a matter of law – the considerations which led Judge Sirica to deny Petitioner's first motion.

6. Therefore, the essential conclusion of law on which the District Court relied in denying Petitioner's first and second motions was expressed in Judge Sirica's statement that "I don't think I should *at this point* intervene in the internal affairs of the University" (R. 623) (emphasis added). The Respondents rephrased the aforesaid *own* considerations of the District Court and replaced them by Conclusion of Law No. 3 which, as filed with the denial of Petitioner's first motion, now reads: "That the Court does not have jurisdiction in this case to control the internal management of the university" (R. 668).

The aforesaid theory of "non-interference in the internal management" and the underlying case law have been succinctly re-stated in Fletcher's Encyclopedia of Corporations:

> "Where... the management and control of the corporation is vested... in a board of directors or trustees, their action *in regard to the affairs of the corporation* is controlling and exclusive.... Their function is to exercise judgment and discretion which the courts cannot do in their stead, and so long as the directors of a corporation *control its affairs within the limits of the law*, matters of business judgment and discretion relating to *internal matters* are not subject to judicial review....: To the extent that the corporate

> articles place the management and control of a corporation in the hands of the directors, they are authorized to use their judgment and discretion in regard thereto. An action taken by them pursuant thereto *will not be reversed by the court at the instance of stockholders.* 5 Fletcher's Encyclopedia of Corporations (1967 Rev. Vol.) section 2104, pp. 481-483 (emphasis added).
>
> "*Reluctance of courts to interfere with the management of corporations is overcome if fraud or bad faith or over-reaching appears*" 5 Fletcher's, *supra*, p. 483, n. 36 (emphasis added).

By relying on the aforesaid theory of "non-interference in the internal management" in denying Petitioner's two motions, the District Court clearly and on several grounds erred as a matter of law and, thereby, grossly abused its discretion, namely (a) by relying on the aforesaid theory, the District Court undertook on a motion of preliminary injunction to determine the question of Petitioner's right to a permanent injunction. Thus, the District Court grossly abused its discretion by attempting to make findings of fact and conclusions of law which were not appropriate to interlocutory proceedings. See *Perry v. Perry*, 190 F.2d 601, 602 (D.C. Cir. 1951); *Interstate Transit, Inc. v. City of Detroit, Mich.*, 46 F.2d 42, 43, 44 (6 Cir. 1921). See also 5 Moore, Federal Practice (wd Ed. 1967), section 52.07, p. 2669. (b) In relying on the aforesaid theory, the District Court effectively denied justice to Petitioner by preventing him from prosecuting his main claim in respect to a permanent injunction.

> "The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

* * *

> "Plaintiff alleges that if a preliminary injunction is not granted, it will be impossible for him to successfully prosecute the main claim. . . . Certainly a court can act where a party's conduct is calculated to frustrate litigation. . . ." *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 727, 728 (3 Cir. 1962).

(c) In relying on the aforesaid theory, the District Court erred also as a matter of law because the reluctance of courts to interfere with the internal management of corporations has been *exclusively* applied to stockholders' and similar suits. Even in such cases courts do interfere if, as shown in Petitioner's second motion (R. 209-212; 426-443) "fraud or bad faith or overreaching appears" Fletcher, *supra.* (d) In relying on the aforesaid theory, the District Court by failing to make findings showing the existence of contractual relationships between petitioner and the Respondent University (R. 168-174; 374-388; 444-445) grossly abused its discretion as a matter of law by, thus, preventing Petitioner to prosecute his claim for a permanent injunction and, thereby, in effect, denying justice to Petitioner.

Clearly, the District Court seems to have erroneously applied in the instant case the British constitutional doctrine that "The King can do no wrong" rather than the principles of equity.

Since the District Court denied Petitioner's first and second motions primarily on the erroneous ground that it should not "*at this point* intervene in the internal affairs of the university" (R. 623). (emphasis added), it did not find it necessary to make any findings of fact as to whether or not Petitioner had made a showing of irreparable injury, inadequate remedy at law, balance of equities, etc. It was only the Respondents who, as an afterthought, included in their "findings of fact and conclusions of law" a conclusory statement to the effect

that Petitioner had failed to make a showing of irreparable injury (R. 668). The aforesaid conclusory and negative finding of the District Court failed completely to conform to the standards of fairness established by this Court when it said:

> "It is of the *highest importance* to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure.
>
> * * *
>
> "...they (the appellants) were *entitled* to have *explicit* findings of fact upon which the conclusion of the court was based. Such *findings* are obviously *necessary to the intelligent and orderly presentation and disposition of the appeal.*" *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316, 317 (1940) (emphasis added).

The statement that Petitioner has an adequate remedy at law if he can prove a breach of contract and damages resulting therefrom (R. 669) is not only inappropriate but clearly intended to obscure in the fact of Petitioner's pending prayer for permanent injunction.

8. A careful reading of the *per curiam* opinion of the Court of Appeals shows the embarrassing situation in which the Court of Appeals had put itself by its determination to affirm the Orders of the District Court denying Petitioner's two motions.

Clearly, the Court of Appeals discarded the rather embarrassing "non-interference" theory on which the District Court had primarily relied in denying Petitioner's two motions. Instead, the Court of Appeals based its affirmation of the Orders of the District Court on:

> ". . .the relevance of such factors as the nature of the injury alleged in relation to the need for equitable relief, the probabilities that Appellant would ultimately prevail on the merits, and the balancing of Appellant's claimed injuries with Appellees interest and convenience in respect to the efficient operation of a university." (Pet. p. 4a).

The Court of Appeals, then, held that the findings of fact made in the District Court "were amply within the bounds of a sound judicial discretion" to deny Petitioner's motions on the grounds which the Court of Appeals had decided to substitute for those on which the District Court had relied. At first sight, this seems to be an ingenious solution for overcoming the problem with which the Court of Appeals was confronted by the District Court's gross abuse of discretion in failing to file the *mandatory* findings of fact and conclusions of law with its Order of February 8, 1968, denying Petitioner's second motion. However, the aforesaid attempt of the Court of Appeals to refuse

> ". . .to consider a substantial contention supported by authorities submitted to [it] and by such evasion [basing its] decision on a ground directly opposed to the evaded contention" *Western Pacific Railway Corp. v. Western Pacific Railway Co.*, 197 F.2d 994, 1018 (9 Cir. 1952) (Chief Judge Denman dissenting); *cert. granted* 344 U.S. 809 (1952); *vac'd* and *rem'd* 345 U.S. 247 (1953).

proves illusory in the light of the two following considerations: (i) What exactly did the Court of Appeals mean by the words that ". . .the findings of fact made in the District Court are beyond serious challenge under Rule 52(a), *Federal Rules of Civil Procedure*. . . ." (Pet. p. 4a)? (ii) Did the District Court when denying the first

Motion make, in fact, findings of *basic* facts which sustain the Court of Appeals in holding "...that the denials of a preliminary injunction founded thereon [*i.e.* on the findings of fact made in the District Court] were amply within the bounds of judicial discretion" (*ibid.*)?

(a) Rule 52(a), *Fed. R. Civ. P.* provides that:

> "...in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact [*i.e.*, it shall 'find the facts *specially*' (emphasis added)] and conclusions of law which constitute the grounds of its action."

If the words of the Court of Appeals that "the findings of fact made in the District Court are beyond serious challenge under Rule 52(a), *Fed. R. Civ. P.* ...." were intended to mean that they correspond to the facts as shown by the record, the Court of Appeals obviously failed to take into consideration (i) that Finding of Fact No. 9 is not only conclusory in nature but that it has, in addition, either no basis in fact or that it implies actual fraud on the part of the University authorities (R. 68-70); and (ii) that the so-called Conclusion of Law No. 1, which is a bare conclusion of ultimate fact, does not meet the requirements of Rule 52(a) *Fed. R. Civ. P.*

On the other hand, if the aforementioned words of the Court of Appeals were intended to mean that the findings of fact made in the District Court are a sufficient basis for denying Petitioner's motions "within the bounds of sound judicial discretion" on the grounds which the Court of Appeals substituted for those of the District Court, the Court of Appeals has, indeed, as will be shown hereinafter (pp. 11-12, *infra*), "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision" Rule 19 of the Rules of this Court.

(b) The grounds on which the Court of Appeals relied in affirming the District Court's two Orders are but a paraphrase of the theory of "estimates" developed by the aforesaid Court in *Perry v. Perry, supra.* However, it is submitted that the Court of Appeals was more candid in *Perry v. Perry, supra,* than it was in the instant case because it said there:

> "When a Motion for a Preliminary Injunction is presented to a Court in advance of a hearing on the merits, it is called upon to exercise its discretion upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of ultimate success or failure of the suit, the balance of damage or inconvenience generally. *A mere listing of the guiding considerations demonstrate their intangible nature, especially when no attempt is made at this stage to decide finally the questions raised. . . .*' We think the denial of the preliminary relief below proceeded from an erroneous premise which prevented the Court from striking the proper balance in this case" *Perry v. Perry, supra,* at 602 (emphasis added).

Clearly, the aforesaid "estimates" on which the Court of Appeals relied must not be arbitrarily established. They have to be inferences which are based on the facts which were either found by the trial court, by the Court of Appeals in *de novo* review, or which were, at least, on the record and specifically referred to by the court of appeals. The aforesaid "estimates" regardless of whether they are made by the trial court or by the Court of Appeals have clearly to be within the limits of sound judicial discretion.

> "When invoked as a guide to judicial action it [discretion] means a sound discretion, that is to say, a discretion exercised *not arbitrarily or willfully*, but with regard to *what is right and equitable under the circumstances* and the law, and directed by the reason and conscience of the judge to a just result." *Langness v. Green*, 282 U.S. 531, 541 (1931) (emphasis added).

Petitioner submits that the grounds on which the Court of Appeals affirmed the denial of the motions by the District Court are completely unsupported by any facts found by the District Court on which the Court of Appeals exclusively relied in affirming the District Court's Orders. Neither are they supported by any facts on the record before the Court of Appeals to which the aforesaid Court would have had to make specific reference if relying on them.

It is submitted that the sociological fact that in the instant case Petitioner is opposed by a powerful organization and the further sociological fact that some members of that organization's governing bodies wield considerable influence did not sufficiently distinguish *Perry v. Perry, supra*, from the instant case so as to justify the Court of Appeals to proceed from the standards established in *Perry v. Perry, supra*, but to arrive at exactly the opposite conclusion.

9. Petitioner submits that the analysis of the two sentences by which the Court of Appeals attempted to dispose summarily of the instant case reveals "a gross miscarriage of justice" Stern and Gressman, *supra*, 147, which calls "for an exercise of this Court's power of supervision" (Rule 19, *supra*).

II

Supervening Conflict of Decisions

Since the Petition for a Writ of Certiorari was filed, the following cases have been reported which show the existence of a direct and explicit conflict between the Court of Appeals for the District of Columbia Circuit and the Courts of Appeals for the Fifth and Sixth Circuits.

In *Acme Boat Rentals v. J. Ray McDermott & Co.*, 407 F.2d 1324, 1325 (5 Cir. 1969) the Court said:

> "The judgment was rendered without a statement of either findings of fact or conclusions of law. . . . Such findings of fact and conclusions of law are mandatory and must be sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the Court. . . .
>
> "The judgment is vacated. . . ."

In *United States v. Claycraft Co.*, 408 F.2d 366, 367 (6 Cir. 1969) the Court said:

> ". . .it appearing that the opinion of the District Court does not satisfy the requirements of Fed. Rules Civ. Proc. Rule 52(a), 28 USC in that the facts are not found specially to permit appropriate review by this Court and to support the ultimate conclusions of the trial court; upon consideration, it is ordered that the judgment be and it hereby is vacated and the case is remanded to the District Court with directions to make findings of facts, state conclusions of law and enter proper judgment."

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

/s/ WILLIAM H. ROBERTS
Petitioner *pro se*

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing was presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

/s/ WILLIAM H. ROBERTS
Petitioner *pro se*